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The World Wide Witness: The Internet As a Trial Witness

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When Toysrus.com, Toys “R” Us, Inc.’s Internet retail business, sued Amazon.com to end their Internet partnership for breach of contract, it faced a key strategic decision: Could it gamble on using its opponent’s own Web site as a key trial witness? Toys “R” Us had to prove to the court that Amazon was violating its exclusivity rights under their contract. The only way to effectively do this was to show the court, live, what was happening in real time on www.amazon.com.

The decision was risky. There was a chance that the Amazon site would not show the violations. It also was not clear whether the live screenshots showing a particular violation — which, of course, would not have existed during the discovery phase of the lawsuit — could even be admitted as evidence.

In the end, however, Toys “R” Us was successful: The court not only allowed the use of the live Internet feed as a witness in the trial, but it also found in favor of Toys “R” Us, and on March 31, 2006, entered a judgment order terminating the contract. This article explores how, and why, Toys “R” Us decided to take this successful gamble.

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THE CASE

In August 2000, Toys “R” Us signed a 10-year agreement with Amazon to become its exclusive retailer of toys, games and baby products. In 2003, however, Toys “R” Us began complaining that some of its competitors were also selling toys, games and baby products on Amazon.com. Amazon responded by stating that it read the term “exclusive” to mean that others could not sell the *specific* products which Toys “R” Us offered (although Amazon had been allowing them to do so by the hundreds), and if Toys “R” Us elected not to sell a *specific* item, Amazon could invite other merchants to its site to offer those products. Mediation in the summer of 2004 failed, and Toys “R” Us was left with no choice but to seek termination of the agreement.

Immediately after the complaint was filed, Toys “R” Us asked for interim injunctive relief to prevent things from getting worse. The court took Amazon at its word and only prohibited it from allowing third parties to sell the same products that Toys “R” Us was offering until the meaning of “exclusivity” could be determined at trial. There was a real danger that the court’s preliminary injunction, which allowed scores of Toys “R” Us’ competitors to trade on the Toys “R” Us brand to draw traffic to their boutiques, would form the model for a permanent injunction that could destroy the value of the Toys “R” Us brand.

THE INTERNET IN COURT

It was this concern over potential harm to the Toys “R” Us brand that led

to the unique, and perhaps unprecedented, decision to use Amazon’s own Web site as a witness at trial. By going live to www.amazon.com early and often during pre-trial hearings, and, most importantly, during the 3-month bench trial, Toys “R” Us hoped to show the court precisely what customers were seeing at that very moment: toys, games and baby products being sold by third-party retailers alongside the Toys “R” Us’ contractually exclusive assortment on Amazon.com.

The issue was not whether Toys “R” Us could find third parties selling the same product, but whether they would be found often enough, and in sufficient quantity, to show that Amazon’s new reading of the agreement — and the way it was implementing that interpretation — could not be what the parties originally intended. The strategy would call for Amazon either to admit the violations on its Web site, or to discredit this evidence and thus discredit itself. Either conclusion supported the Toys “R” Us position that the agreement could not be enforced by a permanent injunction and must be terminated.

The pre-trial hearings seeking interim relief allowed Toys “R” Us to test its strategy. Using laptop computers, wireless modems, projectors and screens, Toys “R” Us took the court directly to the Internet and conducted searches — just like a customer sitting at home would. For example, by running a search for a “Magnadoodle” toy on www.amazon.com before the court, a list of search results appeared containing a Magnadoodle sold by Toys “R” Us *and* one sold by a third party. This same exercise was repeated several times in pre-trial hearings. It is

perhaps an understatement to say that the court found it very persuasive to have a real-time search conducted on Amazon's own Web site show third parties selling toys, games and baby products in violation of the court's injunction.

IT WORKED IN REHEARSAL ...

However successful the tactic was during pre-trial hearings, though, using the Internet as a witness during trial presented additional challenges. For one, Amazon could have changed its search methodology and altered the appearance of its site to mask its violations. And, while Amazon loaded its site with thousands of competing toys, games and baby products, it was doing a better job of policing the exact duplicates that Toys "R" Us had been able to find during the injunction hearings. Finally, in terms of admissibility, courts typically restrict evidence to those matters that have been shared with the other side during pre-trial discovery. Yet there was no way that Toys "R" Us could anticipate what would be on the Amazon site during trial in the fall when discovery closed at the end of June.

Just as importantly, Toys "R" Us also needed to win the argument that going live to the Internet during trial would not be unfair or surprising to Amazon. This was the most difficult legal hurdle. Toys "R" Us argued that if Amazon knew how its site was operating, it could not be "surprised" by a live visit and, therefore, the object of pre-trial discovery — apprising your opponent of the evidence to be used at trial — was met. On the other hand, if Amazon did not know what was happening on its own site, then how could the court expect a permanent injunction to work when there was no certainty that Amazon could comply? The court allowed Toys "R" Us to proceed with its unique strategy.

There was also the technological problem of bringing an Internet "witness" live to court each day and creating a record that would withstand appellate scrutiny. While architecturally inviting, the courthouse in Passaic County had older wiring that would not

transmit the amount of data contained on the Amazon Web site relatively quickly. Without a sufficient hard line connection, the most efficient way to bring the Internet live into court each day was through the use of wireless modems. Toys "R" Us therefore equipped its laptop computers with wireless modems to connect to Amazon's Web site, run its searches and "capture" the screenshots.

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The ability to "capture" screenshots was critical to using the Internet as a witness. A trial simply could not be conducted without the ability to show, capture, mark as an exhibit and then introduce into evidence each screenshot that was shown in court. Toys "R" Us relied on a program called "Snagit," which saved each screenshot displayed in court in a matter of seconds. Each day after court was adjourned, Toys "R" Us would print and mark color copies of each screenshot and submit them to Amazon and the court. More than 100 of these "snagged" screenshots were moved into evidence during the course of the trial.

As for the risk that Amazon could change its site on a whim (as happened several times during the trial), each night Toys "R" Us scoured Amazon.com for violations of the interim orders and saved screenshots of third-party products it planned to use the next day. A few minutes before Toys "R" Us would ask a witness about a specific third-party product, it would check Amazon.com from a second laptop in the courtroom to see if the offending product was still offered. If so, Toys "R" Us would project the live image on a screen commanding one side of the room. Its counsel would ask the

witness — usually an Amazon executive — whether a simple search on www.amazon.com had returned both the Toys "R" Us product and the third-party product. The answer was always "yes," despite the provisions of the agreement and the injunction that prohibited such sales. When an Amazon witness denied that identical screenshots reflected identical products despite the images before everyone's eyes, testimony which seriously undermined Amazon's overall credibility, Toys "R" Us would order the products and bring them into court, confirming what the Internet had shown but the human witnesses had denied. While Amazon's CEO was on the stand, Amazon.com revealed that Amazon had posted more than 700 toys from Target, one of Toys "R" Us, Inc.'s biggest competitors, on the Amazon site (they were removed before the end of his testimony.) While another witness was discussing the importance of the Toys "R" Us brand, the Web site revealed that Amazon had posted adult-themed toys in its online toy store, incorrectly saying they were being offered for sale by Toys "R" Us they were taken off the site minutes after the witness left the stand.)

In the end, it was the Internet that showed the strategic alliance had to come to a close. The court found Toys "R" Us' strategic decision to make its opponent's own Web site a key (and recurring) witness "unique but invaluable," and said the Internet "cannot be ignored as a tool for fact finding." The lesson is plain: In e-commerce litigation, ignore the Internet at your own peril.



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